**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
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| Petition for Rulemaking of Fibertech Networks, LLC | ) | RM No. 11303 |
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To: The Commission

# JOINT OPPOSITION OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, DUKE ENERGY CORPORATION, WISCONSIN ELECTRIC POWER COMPANY WPS RESOURCES CORPORATION AND XCEL ENERGY INC.

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Dated: January 30, 2006

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## EXECUTIVE SUMMARY

Fibertech's Petition for Rulemaking should be denied, as it has not presented sufficient evidence to warrant altering the current rules.[1] The FCC has declined to address Petitions for Rulemaking that have asked the Commission to act beyond the Commission's normal area of expertise and jurisdiction, or where such an effort would be duplicative of, or counterproductive to, efforts by other governmental agencies.[2] Such is the case here.

Moreover, as in this case, the FCC has declined to institute rulemakings where the Commission's rules would not be an appropriate venue for dictating operational procedures, the expertise for which resides with local or regional bodies.[3] Fibertech's specific grievances are focused on the competitive motives of Incumbent Local Exchange Carriers, giving little thought to the practical implications if its suggested rules were extended to electric utility facilities. In particular, its suggested rules would increase the likelihood of conflict between pole owners and attachers, and would endanger electric utilities' ability to safeguard critical electric infrastructure, workers, and the general public. For each of these reasons, the Petition should be rejected.

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[1] *See, e.g., In re Industrial Telecommunications Association, Inc.; Amendment of Part95 of the Commission's Rules to Establish a Very Short Distance Two-Way Voice Radio Service*, 19 FCC Rcd. 6988, 6988 (PSCID WTB, rel. Apr. 21, 2004).

[2] *See, e.g., Letter to James J. Flyzik, Federal Law Enforcement Wireless Users Group*, 19 FCC Rcd. 11500 (WTB June 28, 2004).

[3] *Id.*

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**WPS RESOURCES CORPORATION AND XCEL ENERGY INC.**

Pursuant to Section 1.405 of the Federal Communications Commission's ("FCC" or "Commission") Rules,[4] American Electric Power Service Corporation, Duke Energy Corporation, Wisconsin Electric Power Company, WPS Resources Corporation and Xcel Energy Inc. (collectively, the "Utilities"), by and through their undersigned attorneys, hereby submit their Joint Opposition in the above-captioned proceeding in response to the Petition for Rulemaking filed by the Fibertech Networks, LLC ("Fibertech").

## I. INTRODUCTION

American Electric Power Service Corporation is a wholly-owned subsidiary of American Electric Power, Inc., and a supplier of administrative and technical support services to seven affiliated operating companies. American Electric Power Company, Inc., through its affiliated operating companies, owns more than 36,000 megawatts of generating capacity in the United

[4] 47 C.F.R. § 1.405.

States and is one of the nation's largest electricity generators. American Electric Power Company, Inc. is also one of the largest investor-owned electric utilities in the United States, with more than 5 million customers linked to its eleven state electricity transmission and distribution grid covering 197,500 square miles. American Electric Power Company, Inc. is based in Columbus, Ohio.

Duke Energy Corporation is a diversified energy company with a portfolio of natural gas and electric businesses, both regulated and unregulated, and an affiliated real estate company. Duke Power, a division of Duke Energy, serves more than two million electric customers in the Carolinas. Duke Energy owns in excess of 1.9 million distribution poles and is subject to the pole attachment regulations of the Commission. Duke Energy Corporation supplies, delivers, and processes energy for customers in North America and selected international markets.

Wisconsin Electric Power Company serves more than 1.1 million electric customers in Wisconsin and Michigan's Upper Peninsula. Operating under the trade name We Energies, affiliates of Wisconsin Electric Power Company serve more than one million natural gas customers in Wisconsin, about 2,500 water customers in Milwaukee's northern suburbs and about 500 steam customers in downtown Milwaukee.

WPS Resources Corporation provides electricity and natural gas to more than 400,000 customers within an 11,000 square mile, 20 county service territory which consists of a large portion of northeast and central Wisconsin and a small part of Upper Michigan.

Xcel Energy Inc., through its affiliated operating companies, generates, transmits, and distributes electricity and distributes natural gas to its customers. Xcel Energy Inc. offers a comprehensive portfolio of energy-related products and services to 3.3 million electricity customers and 1.8 million natural gas customers across 10 Western and Midwestern states. Xcel

Energy Inc. operates more than 70 power plants that generate about 15,295 megawatts of electric power.

Collectively, the Utilities own or control nearly twelve million poles in twenty-two states that are governed by the FCC's pole attachment authority. As such, they are vitally interested in those issues affecting the integrity and use of their electric plants for communications purposes.

## II. THE PETITION DOES NOT SUPPORT THE NEED FOR A FEDERAL RULE

Fibertech's Petition for Rulemaking should be denied, as it has not presented sufficient evidence to warrant altering the current rules.[5] The FCC has declined to address Petitions for Rulemaking that have asked the Commission to act beyond the Commission's normal area of expertise and jurisdiction, or where such an effort would be duplicative of, or counterproductive to, efforts by other governmental agencies.[6] Such is the case here. Moreover, as in this case, the FCC has declined to institute rulemakings where the Commission's rules would not be an appropriate venue for dictating operational procedures, the expertise for which resides with local or regional bodies.[7] For each of these reasons, as described below, the Petition should be rejected.

At most, Fibertech's Petition for Rulemaking illustrates a few isolated incidents where it has encountered difficulties with an Incumbent Local Exchange Carrier ("ILEC") when seeking to install its communications cables on a small percentage of ILEC poles. This anecdotal recitation, however, does not illustrate the need for nationwide rules that address not only ILEC

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[5] *See, e.g., In re Industrial Telecommunications Association, Inc.; Amendment of Part95 of the Commission's Rules to Establish a Very Short Distance Two-Way Voice Radio Service*, 19 FCC Rcd. 6988, 6988 (PSCID WTB, rel. Apr. 21, 2004).

[6] *See, e.g., Letter to James J. Flyzik, Federal Law Enforcement Wireless Users Group*, 19 FCC Rcd. 11500 (WTB June 28, 2004).

[7] *Id.*

practices with respect to pole access, but which micromanage complex electric utility engineering practices for which the FCC lacks expertise and is not the primary regulating entity. In fact, Fibertech does not point to any particular dispute with an electric utility, and bases most of its requests on the sweeping generalizations and allegations of *potential* harms that rely on alleged anti-competitive motives on the part of ILECs, which have not been shown to be present in Fibertech's relationship with *electric* utility pole owners. Sweeping electric utilities into this request, therefore, is inappropriate, and would have far-reaching and detrimental consequences for the Utilities' ability to safeguard the physical integrity and reliability of their critical electric distribution infrastructure.

Furthermore, Fibertech has not shown that the current complaint process is inadequate to address the issues it raises. For example, although Fibertech alleges a two month delay at one point by Verizon,[8] Fibertech does not indicate that it sought the FCC's assistance or that of the state PSC through a complaint or petition for temporary stay, and that the complaint process was inadequate or untimely. Indeed, one value of the using the complaint system for *ad hoc* problems is that the FCC, where it has jurisdiction to do so, may fully consider the variety of factual issues that attend the situation described by the Petitioner, and may do so in a timely manner where access issues are involved.[9]

## III. THE FCC DOES NOT HAVE THE JURISDICTION OR EXPERTISE TO SPECIFY ELECTRIC UTILITY ENGINEERING AND SAFETY STANDARDS

In granting jurisdiction to the FCC over pole attachments, Congress recognized that the FCC is not the primary agency responsible for overseeing the electric utility industry, nor does the FCC have any specific expertise with respect to electric utilities and their unique safety and

[8] Petition at pp. 31-32.

[9] *See, e.g.*, 47 C.F.R. § 1.103(d) (providing an mechanism for a Petition for Stay and expedited pleading schedule where disputes relate to a denial of access).

operational issues. For this reason, in crafting the Pole Attachments Act, Congress carefully circumscribed the FCC's authority in this area solely to the determination of whether the rates, terms, and conditions of attachment are just and reasonable.[10] Moreover, Congress recognized that there are certain instances where access to electric utility poles for communications purposes is inappropriate, and the Pole Attachment Act therefore provides a specific exception to access for reasons of insufficient capacity, safety, reliability or generally applicable engineering purposes.[11] The Pole Attachments Act, as affirmed by the Eleventh Circuit Court of Appeals, recognizes electric utilities' right and obligation to safeguard its infrastructure, including its poles, ducts, conduits, and rights of way, its electric operations, and its workers.[12] Of paramount importance, Congress expressly recognized that the safety of the electric utility plant must be safeguarded, and for this reason, the Petition must be denied.

The legislative history of the Pole Attachments Act also illustrates that Congress recognized the safety of the electric plant was within the unique province and expertise of the utility. Under an early version of the Pole Attachments Act, H.R. 94-1630, the FCC could "not require a utility to provide any pole attachment if the *utility* has determined that any such attachment should not be permitted due to a matter not subject to the regulation of the [FCC]."[13] While this language eventually evolved into the language we are now familiar with in Section 224(f), this early understanding clearly informs the language of the provision and instructs that: (1) the utility is uniquely positioned to understand the capabilities, requirements and limitations of its electric infrastructure in terms of maintaining the safety and reliability of the Nation's

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[10] S. Rep. No. 95-580 at 15 (1977) ("This expansion of FCC regulatory authority is strictly circumscribed…").

[11] 47 U.S.C. § 224(f)(2).

[12] *See, e.g.,* 47 U.S.C. § 224 (f)(2); *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

[13] H.R. Rpt. No. 94-1630 at 6 (1976).

electric network and supply; and (2) the FCC is not the most appropriate entity to pass judgment as to practices not within its particular area of expertise.

Congress also recognized the local nature of pole attachment issues, allowing state public service commissions ("state PSCs") to effect a "reverse preemption" of FCC jurisdiction over pole attachments should they choose to do so.[14] Even where a state has not specifically preempted FCC jurisdiction with respect to communications attachments, however, state commissions possess the statutory authority and expertise to address the electric utility engineering issues that Fibertech seeks to appropriate for the FCC. It strains reason, however, to read the Pole Attachments Act to say that, in specifying that the FCC may regulate the rates, terms and condition of communications attachments, Congress intended to provide the *communications* agency with jurisdiction over *electric* engineering issues that are local in nature and already regulated on a variety of fronts by other expert agencies.

Section 224(c) of the Pole Attachments Act, 47 U.S.C. §224(c), also implicitly recognizes that state law already addresses issues of safety, reliability and generally applicable engineering matters. For a state to preempt the FCC under section 224(c) with respect to *both* (1) rates, terms and conditions, and (2) pole or conduit access issues under section 224(f), a state need only certify that it regulates rates, terms and conditions of pole attachments. Section 224(c) does not require the state to additionally certify that it has authority to regulate access rights under section 224(f), including the safety, reliability, or engineering issues noted in section 224(f)(2). Thus Congress appears to have understood that states already have, and adequately exercise, such authority.

[14] 47 U.S.C. § 224(c).

State PSCs are in day-to-day contact with the utilities under their jurisdiction, and are the most proficient bodies with respect to evaluating and understanding the utility both as a whole and in the context of the locality to ensure the safety and maintenance of their plants. The FCC has recognized their expertise, and *presumes* state and local requirements affecting pole attachments to be reasonable and entitled to deference, *even if the state has not sought to preempt federal regulations under Section 224(c).*[15] With respect to the areas in which the Utilities operate, state law addresses electric utility safety and reliability and the state PSCs are intimately involved in monitoring and working with the electric utilities in their states.

For example, Wisconsin law provides that utilities "construct, operate and maintain" wires and any related equipment in a manner which is "reasonably adequate and safe" and which does not unreasonably interfere with the service furnished by any other public utility. The state PSC is also authorized to issue rules "requiring electric construction and operating of such wires and equipment to be safe."[16] The Wisconsin PSC may also hear complaints regarding whether "public safety or adequate service requires changes in construction, location or methods of operation," and may issue orders requiring "change in construction or location or change of methods of operation required for public safety or to avoid service interference."[17]

Similarly, the North Carolina Utilities Commission ("NCUC") has jurisdiction over public utilities within the state, including Duke Energy, ILECs, CLECs and others. The NCUC is empowered by the legislature "to adopt reasonable rules and regulations for the safety of the

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[15] *See, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers Local Competition*, Order on Reconsideration, 14 FCC Rcd. 18049 at ¶ 6 (1999) ("Local Competition Order on Reconsideration")(emphasis added).

[16] Wis. Stat. § 196.74.

[17] *Id.*

public as affected by public utilities and the safety of public utility employees."[18] Further, the Commission has adopted by rule the NESC as follows:

> The current rules and regulations of the American National Standards Institute (ANSI) entitled "National Electrical Safety Code" are hereby adopted by reference as the electric safety rules of this Commission and shall apply to all electric utilities which operate in North Carolina under the jurisdiction of the Commission.[19]

The NCUC has adopted a companion rule for telephone utilities, a term which includes CLECs:

> The current rules and regulations of the American National Standards Institute (ANSI) entitled "National Electrical Safety Code" are hereby adopted by reference as the communication safety rules of this Commission and shall apply to all telephone utilities which operate in North Carolina under the jurisdiction of the Commission.[20]

The Public Service Commission of South Carolina ("PSCSC") has general powers to regulate electric and telephone utilities as follows:

> The Commission may make such rules and regulations not inconsistent with law as may be proper in the exercises of its power or in the performance of its duties under this Chapter, all of which shall have the force of law.[21]

> The Commission may make such rules and regulations not inconsistent with law or statute as may be proper in the exercise of its powers or for the performance of its duties under this chapter all of which shall have the effect of law.[22]

The PSCSC has similarly adopted the NESC as an acceptable electric standard:

> The electric plant of an electrical utility shall be constructed, installed, maintained and operated in accordance with good engineering practice to assure, as far as

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[18] North Carolina General Statutes §62-41.

[19] Rules and Regulations of the North Carolina Utilities Commission, Rule R8-26.

[20] Rules and Regulations of the North Carolina Utilities Commission, Rule R9-1.

[21] §58-27-150, S.C. Code of Laws, 1976.

[22] §58-9-810, S.C. Code of Laws, 1976.

reasonably possible, continuity of service, uniformity in the quality of service, and the safety of persons and property.[23]

Unless otherwise specified by the Commission, after hearing if requested, the electrical utility shall use the applicable provisions of the latest edition, Part 2, of the "National Electrical Safety Code", as minimum standards of accepted good engineering practice.[24]

Part 2 of the "National Electrical Safety Code" (latest edition), is considered by this Commission to be an acceptable reference. New additions to Part 2 of the National Electrical Safety Code shall become effective six months after the date of final approval by the American National Standards Institute unless a request for a hearing has been granted by the Commission.[25]

Similarly, the PSCSC has established the NESC as an acceptable standard for telephone utilities.

The plant of each utility shall be constructed, installed, maintained, and operated in accordance with accepted good engineering practices and regulations, included by reference as part of these rules as far as possible. Continuity of service, uniformity in quality of service furnished, and the safety of persons and property shall be maintained.[26]

Unless otherwise specified by the Commission, each utility shall use the applicable provision in the publication listed below as standards of accepted good practices:

a. Latest edition of The National Electrical Safety Code.[27]

The FCC has recognized the unique interest electric utilities have in preserving the safety and reliability of their electric plants by making sure that attachments to their poles are "safe and

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[23] §103-360. Requirements for Good Engineering Practice, South Carolina Public Service Commission Regulations.

[24] §103-361. Acceptable Standards, South Carolina Public Service Commission Regulations.

[25] §103-362. Acceptable Standards, South Carolina Public Service Commission Regulations.

[26] §103-640. Requirements for Good Engineering Practice, South Carolina Public Service Commission Regulations.

[27] §103-641. Acceptable Standards, South Carolina Public Service Commission Regulations.

in accordance with agreed upon standards."[28] Further, the Commission has recognized the expertise of other agencies in addressing safety and reliability issues associated with the electric plant and those who come in contact with it, including the federal Occupational Safety and Health Administration ("OSHA"), the Federal Energy Regulatory Commission ("FERC"), state occupational safety commissions, and state PSCs.[29] Utilities must have the flexibility to address all of these demands.

The FCC has declined in the past to adopt specific engineering rules to determine when access may be denied because of safety, capacity, reliability, or engineering concerns.[30] Rather, these issues are generally addressed on a case-by-case basis as warranted. A variety of other agencies possessing greater electric utility and safety expertise than the FCC also already have authority over those aspects of electric utility standards that Fibertech seeks to usurp. The FCC should let those expert agencies and the utility address these issues, rather than relying on a strained reading of the Pole Attachments Act to justify sweeping changes and national standards addressing subject matter that is more comprehensively addressed by other, more specific statutes and regulations and state/local regulation.

Fibertech puts great stock in the actions of state PSCs that have acted to impose engineering obligations on electric utilities with respect to timing for make-ready or conduit access. These state PSCs, however, are local bodies possessing general jurisdiction over both the communications companies and the electric utilities before it, whereas the FCC does not. State PSCs address the needs of electric utilities on a day-to-day basis, are intimately familiar with

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[28] *Mile-Hi Cable Partners v. Public Service Company of Colorado,* 14 FCC Rcd. 3244, ¶ 19 (1999).

[29] *Local Competition Order on Reconsideration* at ¶ 1147.

[30] *Id.*

local issues impacting the provision of electric service and communications services, and are also responsible to the electric utilities' customers as well as the customers of the communications companies.[31] The state PSC, therefore, is better positioned to craft rules that impact the interaction between the engineering, safety and reliability needs of electric utilities and the needs of communications companies and the costs imposed upon their respective customers. That states like New York or Connecticut, who are closer to the issues, have taken it upon themselves to craft rules particular to their localities does not imply that *national* rules addressing local utility engineering practices are necessary or appropriate.

Moreover, as noted herein and as recognized by the FCC in the past, nationwide rules would paint with too broad of a brush over issues that are nuanced and varied depending on utility construction practices, utility plant variations, and regional considerations such as topography and weather. Further, the rules adopted New York do not represent the full panoply of state decisions addressing utility construction practices in the pole attachment context. For example, the Public Utility Commission of Ohio ("PUCO") has considered and upheld AEP's policy not to permit the use of brackets, and approved other engineering and construction standards adopted by AEP, including but not limited to, an extensive review by the pole owner of the effects upon pole loading of the proposed attachment.[32]

Fibertech also fails to recognize that the Commission has already found that the NESC, among other sources, is an appropriate standard to which it should defer in matters of safety and

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[31] *See, e.g.*, Vermont Public Service Board Rule 3.701(A) ("In applying this Rule, the Board shall consider the interests of entities seeking or having attachments, Pole-Owning Utilities, and the customers of each.").

[32] *In re Complaint of Ohio Cable Telecommunications Ass'n et al. v. Columbus Southern Power Co. dba American Electric Power,* Opinion and Order, Case No. 96-1309-EL-CSS, at 19 (rel. Aug. 27, 1997); Entry on Rehearing at 7 (rel Oct. 16, 1997).

reliability.[33] All of the Utilities comply with the NESC at a minimum. The NESC contains minimum specific engineering and design standards regarding the proper installation and grounding of an electric utility distribution grid, as well as the appropriate practices for attaching communications facilities to ILEC and electric utility poles. The NESC is a standard that covers basic provisions for the safeguarding of persons from hazards arising from the installation, operation, or maintenance of 1) conductors and equipment in electrical supply stations, and 2) overhead and underground electric supply and communication lines. It also includes work rules for the construction, maintenance, and operation of electric supply and communication lines and equipment. As such, the NESC is an appropriate source for addressing pole attachment practices.

Development of the NESC began in 1913 at the National Bureau of Standards. The NESC is currently sponsored and approved by the Institute of Electrical and Electronic Engineers ("IEEE"), an international standards association which is an Accredited Standards Committee C-2 of the American National Standards Institute ("ANSI"). As an ANSI standard, the NESC is a broad consensus standard that is constantly being reviewed and revised. The Standards Committee Membership, which provides direction for the NESC includes representatives from the following industries and organizations: telephone, insurance, public power, railroads, unionized labor, contractors, national safety council, electric, regulatory utility commissioners, manufacturers, cable television, professional engineers, US Departments of Energy and Agriculture.

The Commission would be well served to continue to defer to the NESC given the expertise of the broad representation of industries involved in the development of the NESC.

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[33] The Utilities note that a number of electric utilities also employ their own engineering standards based on the NESC, which account for the local engineering needs of the utility and their business planning/liability concerns.

Fibertech would be well served to bring any suggested construction practice changes to the NESC Standards Committee Membership so that such practices may be fully vetted to ensure that infrastructure reliability and access is not compromised for *any* party on a pole.

## IV. FIBERTECH'S PROPOSED RULES WOULD BE INAPPROPRIATE AND UNNECESSARY AS TO ELECTRIC UTILITIES

Assuming, *arguendo*, that the FCC has jurisdiction to enact the rules that Fibertech proposes, the FCC should nonetheless decline to initiate a rulemaking. The recommendations are ill-advised, and would result in a substantial increase in disputes before the FCC rather than decreasing them as Fibertech suggests. As discussed below, flexibility is absolutely necessary to a utility to be able to take into account the wide variety of engineering circumstances that can sometime be pole-specific. Requiring the FCC to micromanage electric utility engineering practices at this level is unsound both from a policy perspective and as a practical matter. The rules suggested would also hamstring utilities and their ability to manage the significant demands placed on their facilities to accommodate attaching entities while ensuring safe, reliable electric energy to the communities they serve.

### A. Boxing and Extension Arms Should Not Be Required Engineering Practices

Fibertech suggests that boxing and extension arms should be *required* where certain criteria are met, including situations where a pole owner has previously employed these techniques on its poles. Simply because an engineering technique is available, however, does not make that technique a "best practice" that should always be employed. Moreover, simply because a condition exists somewhere on a utility's plant does not mean that the condition should be replicated under the circumstances suggested by Fibertech. In many instances, these conditions exist as the result of an unauthorized attachment by an attaching party, or have been used as a rare last-resort exception after considered analysis of the particular pole in question.

American Electric Power Company, for example, has discovered over 250,000 unauthorized attachments within its eleven state territory. Duke Energy had 68,000 unauthorized attachments made to its facilities during the past five year cycle of attachment inventories. A random sample of attachments made to Duke facilities during recent inventories of both cable and communications attachments yielded 29% of the sample attachments with NESC code violations, including direct attachment to overhead utility conductors.

Fibertech's proposal to require boxing and extension arms as a means of avoiding expensive pole replacements is contradictory and demonstrates a fundamental misunderstanding of the clearance requirements for pole attachments. A pole attachment would cause a pole replacement either where (1) the strength of the pole was insufficient to support the existing loads with the addition of the new attachment or (2) there was insufficient clearance on the pole to permit the addition of the new attachment, and a taller pole was required to create additional clearances. Neither of the conditions would be resolved by either boxing or an extension arm, because neither of these "solutions" add strength to the pole nor do they provide *vertical* clearance.

For a pole replacement caused by insufficient strength of the pole, the addition of a bracket with its additional weight, wind and ice loading, and bending moment would add to the load of the pole attachment and provide no benefit. Indeed, it would worsen the problem.

Where a pole is replaced to a taller pole to obtain clearance, the clearance gained is vertical clearance. Neither the boxing proposal nor the addition of a bracket adds one inch of vertical clearance. The proposed solution highlights Fibertech's fundamental misunderstanding of the clearance requirements of the NESC. The NESC requirements for separation between communications facilities and between communication and electric utility facilities on a pole are

both horizontal clearances and vertical clearances. Vertical clearance requirements are measured vertically, not horizontally or diagonally. A communications conductor installed on an extension bracket or boxed on the pole may in some instances gain *horizontal* clearance, but not vertical clearance. Boxing or brackets are not substitutes for pole replacements to obtain either additional strength or additional clearance.

In fact, Fibertech's suggestion to require boxing and extension arms would render an electric utility's plant more dangerous for maintenance crews, would produce significant delays, additional expense during emergency restoration, operations, maintenance and routine pole replacement. Accordingly, Fibertech's suggestion that boxing and extension arms be used on a routine basis as a "best practice," and that failure to permit such practices is *per se* unreasonable as a matter of federal law, should be rejected.

**1. Boxing and Extension Arms Adversely Impact Pole Climbability**

Fibertech suggests that accessibility by bucket truck is sufficient reason to permit boxing or extension arms. This type of accessibility, however, is not an industry standard and would interfere with routine maintenance and emergency restoration efforts. Rather, the engineering and construction practice of the Utilities is to ensure that poles are accessible by climbing without the use of a bucket truck wherever possible. Poles accessible solely by bucket truck will only be constructed or engineered in such a manner as a last resort, not on a routine basis. Fibertech's suggestion, therefore, that accessibility by bucket truck is sufficient ignores the realities of electric utility engineering and would inappropriately restrict the Utilities' ability to access their own facilities.

For example, the Utilities routinely monitor their poles and employ personnel to trouble-shoot their distribution systems. These employees, however, are *not* routinely equipped with bucket trucks, and the cost to do so would be prohibitive. These troubleshooters in the field must

be able to climb the poles for detailed inspections or repairs on an immediate basis. The presence of boxing or extension arms makes this proposition dangerous, and may preclude climbing entirely, thus denying the utility access to its own facilities in the time and manner necessary to safeguard or repair its plant.

Section 236 of the National Electrical Safety Code ("NESC") also requires that structures that are sometime expected to be climbed (such as when storm damage has occurred) must include adequate climbing space. As noted by the NESC Handbook, it is important to provide adequate climbing space all the way up the pole to avoid worker interaction with equipment attached to the pole to ensure their safety and to avoid damage to facilities by tools or climbing spurs.[34] Boxing and extension arms impede the preservation of adequate climbing space and should not, therefore, be required on a routine basis.

### 2. Boxing and Extension Arms Create Practical Difficulties for Pole Maintenance and Replacement

Where a pole includes the use of boxing, a variety of practical difficulties are created. In the first instance, boxing limits the ability to replace the pole, whether routinely or in an emergency situation. That is, to preserve boxing on a pole, the replacement pole could only be set *in the same place* as the old pole, and would have to be "threaded" through the boxed wires. This is an extremely daunting and dangerous task given that size of the distribution poles involved and the precision that would be required. Alternatively, if the replacement pole were placed adjacent to an old pole that contained boxing, the boxing could not be preserved, as the cable would have to go over or under the new pole (impossible) or be cut and reattached (impractical) to be placed in a similar boxed arrangement on the new pole. In such instances transferring the attachments to a replacement pole would require that all attachments be moved

[34] Allan Clapp, NESC Handbook, Fourth Edition (IEEE, 1996).

to the same side of the new pole. To preserve required NESC separations, formerly boxed facilities would have to be spaced up and down the same side of the pole which may require communications conductors to be spliced to keep from exceeding conductor tension, and may require that the replacement pole be taller than the old pole. While both scenarios are unworkable at best when pole replacement is affected in the normal course, it becomes dangerous and debilitating when crews must address emergency pole replacements due to storms, automobile accidents or other emergency events affecting or breaking distribution poles.

Extension arms are equally problematic, as they function essentially as a lever that can increase the stress on a pole and the likelihood that it may be pulled down or damaged in severe weather conditions.

### 3. Utilities are Not Required to Expand Capacity

The statements quoted by Fibertech[35] with respect to the use of boxing and extension arms and the Commission's approval of these techniques were made in the context of the FCC's assertion that a utility has an obligation to expand capacity to accommodate attachers, contrary to the plain language of 47 U.S.C. Section 224(f)(2) – a notion that has since been overturned by the Eleventh Circuit.[36]

Fibertech suggests that these techniques could be used to *avoid* the need to expand capacity and thus, presumably, eliminate crowding on poles and the obligation under *Alabama Power Co. v. FCC* to pay just compensation to utilities for the use of their space.[37] Make ready work in general and the use of the techniques suggested in particular, *are themselves* expansions of capacity, in that they modify the pole in a manner not contemplated by the original design of

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[35] Petition at 14.

[36] *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

[37] *Alabama Power Co. v. FCC*, 311 C.3d 1357 (11th Cir. 2002).

the facility to accommodate additional communications attachments. Such expansion, however, is not required under the plain language of the Pole Attachments Act or under *Southern Co. v. FCC*. As the Eleventh Circuit noted and as jurisprudence firmly establishes, statutes must be construed in a manner that to "give effect, if possible, to every clause and word of a statute."[38] As then-Commissioner Michael Powell also noted, it is hard to see how Section 224(f) can be given any meaning if utilities are required to expand capacity at the request of third parties.[39] Boxing and extension arms are third-party requested make ready intended to expand capacity and create space where existing space was insufficient, and as such are not required under the Act.

### B. The FCC Should Not Dictate Shortened Utility Response Times to Attachment Requests or Dictate Priority for Field Surveys/Make-Ready

Fibertech suggests that the FCC should consider shortening survey and make-ready time periods in order to eliminate the unfair advantage that ILECs have when they install facilities for their own use faster than they do for competitors.[40] Rather, Fibertech recommends that the FCC establish a per se rule of unreasonableness if field surveys take more than 30 days after the receipt of a completed application, and if make-ready work takes more than 45-days after payment for work. Again, however, Fibertech overlooks the complications that would flow from its suggestion as to electric utilities rather than ILECs, and fails to support its claim that current rules are insufficient. Fibertech offers nothing more than its eagerness to attach as a rationale for

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[38] *Southern Co.* at 1346-1347, *quoting Williams v. Taylor*, 529 U.S. 362,494 (2000).

[39] *Local Competition Order on Reconsideration*, 14 FCC Rcd at 18099 (Powell, Comm'r, concurring in part and dissenting in part).

[40] Petition at p. 16.

the shortened 30-day time frame for completion of surveys and offers no evidence that 45-days is sufficient or feasible for make-ready work.[41]

In particular, Fibertech claims that ILECs completing their own work in advance of work for competitors is discriminatory. Electric utilities are not similarly situated to ILECs, and are not compelled by the terms of the Pole Attachments Act to prioritize communications attachment make-ready over the maintenance of the electric grid and the needs of electric customers. Most electric utilities are operating with a minimum lead time of 60 to 90 days for providing electric service to their customers, which is their core business. The Utilities deploy their crews in accordance with the needs of the electric grid. They are, and should be, governed by need such as emergency restoration of electric service and mutual aid obligations to other utilities in times of natural or man-made disaster. Establishing a *per se* rule eliminates the needed flexibility to address these issues; the current rule prohibiting unreasonable delay is sufficient.

### C. Use of Third-Party Contractors for Field Surveys and Electric Make-Ready Should not be Permitted

Fibertech suggests that new attachers should be allowed to hire third-party contractors to complete field surveys, make-ready determinations, and perform make-ready work where the utility has insufficient worker capacity to address attachment requests in a timely fashion.[42] This scenario, however, is wholly untenable in the context of work on electric facilities.

The FCC has already determined that qualified third-party contractors should be permitted to conduct make-ready associated with *communications facilities*. The FCC has *not*, however, required electric utilities to allow third-party contractors not under the control of the

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[41] Fibertech also overstates the FCC's rules on this point. The rules do not require that surveys be completed within 45 days, only that the utility notify the applicant within 45-days if it is denying access. 47 C.F.R. § 1.1403(b).

[42] Petition at pp. 18-19.

utility to perform make-ready work that affects the utility's electric facilities.[43] The FCC should not reverse this thinking here.

In the first instance, it is completely inappropriate to allow a communications attacher to survey and make determinations as to the capacity and integrity of an electric utility facility to support its communications attachments. The incentive of an attacher is not to safeguard electric service (or the attachments of other communications companies, for that matter), but to get its equipment installed as cheaply and as quickly as possible. This goal is often incompatible with prudent electric engineering practice. Moreover, the Pole Attachments Act gives the *utility*, not the attacher, the right to determine when to deny access for reasons of capacity, safety, reliability, and generally applicable engineering practices.[44]

Utilizing third-party contractors to perform make-ready surveys eliminates the ability of the utility to review the impact of the proposed installation on planned system improvements or overall system planning. This could easily result in higher costs at a later date to the utility and the communication company.

Even where utilities themselves employ third-party contractors to work on their facilities, it is the control and supervision of the contractor *by the utility* that is critical to working on utility facilities or in proximity to the energized conductors and equipment. This is true not only for reasons related to safeguarding the electric facilities and ensuring service reliability, but also due to the need for precise coordination in many make-ready scenarios requiring the utility to re-route, block or interrupt power flow to conduct work. A utility may not abdicate its responsibility under state law and any attempt by the Commission to assign such rights to third

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[43] *See, e.g., Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, DA 00-1250, 15 FCC Rcd 9563 at ¶ 18 (June 7, 2000), *vacated by* 17 FCC Rcd 24414 (2002).

[44] 47 U.S.C. § 224(f)(2).

parties would, at a minimum, be imprudent and contrary to public utility law and, at worst, dangerous.

### D. Current Utility Policies with Respect to Drop Lines are Sufficient

Fibertech suggests that the FCC should require utilities to permit installation of drop lines without prior licensing. The reality of the matter is, however, that many pole-owners, including the Utilities, allow these attachments without *application*, in certain circumstances where pole reliability will not be adversely affected, but do require *notification* either before or after attachment and payment of appropriate rental fees. Such practices ensure that attaching parties can meet response deadlines without sacrificing pole reliability. A wholesale policy of permitting all service drops is not prudent when certain service drops may adversely affect pole reliability. The pole owner, with its extensive knowledge of local conditions and building practices, is in the best position to determine the types of poles and scenarios where notification of service drop attachment will not adversely affect pole reliability.

In truth, however, Fibertech is also seeking to have the FCC validate a host of attachments *nunc pro tunc* and to endorse a common practice of attachers to neither seek permission nor provide notification of attachment for drop lines. This has resulted in over a quarter of a million unauthorized attachments in American Electric Power's territory and 68,000 unauthorized attachments in the Duke Energy systems alone that are very often made in violation of the NESC, posing a hazards to the reliability of the system, increasing likelihood of cable pull-downs, and endangering utility workmen and the public. As Fibertech notes, these drops are generally the last leg to a customer premise. As such, attachers are highly motivated to install these facilities as quickly as possible to commence service, and often employ untrained day laborers paid by the cable mile or the number of customer installations to put these drop lines in place. Safety often comes second place to speed.

### E. Homeland Security Precludes Access to Conduit Records and Surveys by Potential Attachers

Fibertech suggests that the FCC should allow "competitors" to search utility records and survey manholes in person to determine the availability of conduit. This request is particularly ill-advised as to electric utility underground infrastructure, and does not warrant consideration in a rulemaking proceeding. Further, the information to which Fibertech seeks unrestricted access is Critical Energy Infrastructure Information (CEII)[45] that holds particular concerns with respect to national security. Unfettered access to this information, particularly relating to urban conduit systems that run beneath city streets, federal buildings, industrial complexes and financial institutions, is ill-advised and must not be granted. The Utilities have always taken particular care in handling this information, and security efforts relating to this information has only increased since 9-11. Unrestricted access to records and the ability to survey such facilities should not even be contemplated.

In any event, the utility systems that house this information is often highly specialized and requires particular training to access and understand. Unsupervised access to these records would be of little benefit, as they would not be usable without a specialized utility employee trained to retrieve and interpret the requested data.

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[45] *See, e.g.,* FERC Order 630, Docket Nos. RM02-4-000-000, PL02-1-000-000 (Feb. 21, 2003), and FERC Order 630-A, RM02-4-000-000, PL02-1-000-000 (July 23, 2003) (defining Critical Energy Infrastructure Information and providing safeguards for it collection and use). Under these orders, CEII is information concerning proposed or existing critical infrastructure (physical or virtual) that: (1) Relates to the production, generation, transmission or distribution of energy; (2) Could be useful to a person planning an attack on critical infrastructure; (3) Is exempt from mandatory disclosure under the Freedom of Information Act; and (4) Gives strategic information beyond the location of the critical infrastructure.

### F. The FCC Should Not Mandate Unsupervised Access to Electric Utility Conduit

Fibertech suggests that attachers should be permitted unsupervised access to utility manholes. Only qualified utility workers, or some limited cases attachers accompanied by qualified utility workers, can even be considered to be allowed access to utility manholes due to the need to be fully aware of the extreme dangers present in these manholes which only qualified utility workers can identify. The same reasons that counsel against unrestricted access to electric utility conduit records apply doubly to unsupervised physical access to utility underground facilities. Under the best circumstances, gaining access to electric utility conduit is highly sensitive. Manholes are dangerous areas in which to work, and Fibertech's request has serious Homeland Security implications. Damage to such facilities can also be difficult and costly to repair, often necessitating street cuts and disruption of traffic. For these reason, a number of utilities do not consider it safe to permit *any* foreign attachments in their conduit systems. For those that do, they require direct supervision of crews by the utility to ensure the safety of the system, the security of buildings under which the facilities run, and the safety of workers involved.

In addition, Fibertech's complaints again go to the restrictions imposed by ILECs on their conduit deployment without any thought as to the implications of such unsupervised access for electric facilities. Access to *electric* manholes on an unsupervised basis should, in the Utilities opinion, not even be considered. To the extent that other utilities permit such access, that is an individual choice based on their relationship with the contractor conducting the work, the state PSC, and the company's decision as to the risk it chooses to bear. This does not suggest, however, that this practice should be made a federal requirement. Utilities that do not permit such access should not be compelled to do so, particularly when there has been no showing as to

the need for a mandated, across the board change in the current FCC practice of evaluating access complaints on a case-by-case basis.[46]

### G. The Conduit Owners Fees for Searches and Surveys Should be Based on Actual Costs

Fibertech suggests that conduit owners fees for searches and surveys should be capped at reasonable levels and CLECs should be permitted to observe such searches and surveys. Because fees can vary based on the level of a request and the detail required, fees for searches and surveys should be based on actual justifiable costs not an arbitrary cap. The same Homeland Security concerns expressed earlier would also preclude or limit CLECs from observing any and all conduit records searches and manhole surveys.

[46] The Utilities also note that where a denial of access is involved the attacher may seek a temporary stay to address the time-sensitive nature of access issues. Nowhere does Fibertech allege that it employed such a measure and found it to be universally inadequate.

## V. CONCLUSION

**WHEREFORE, THE PREMISES CONSIDERED**, American Electric Power Service Corporation, Duke Energy Corporation, Wisconsin Electric Power Company, WPS Resources Corporation and Xcel Energy Inc. respectfully request that the Commission deny Fibertech's Petition for Rulemaking.

Respectfully submitted,

**AMERICAN ELECTRIC POWER SERVICE CORPORATION, DUKE ENERGY CORPORATION, WISCONSIN ELECTRIC POWER COMPANY, WPS RESOURCES CORPORATION AND XCEL ENERGY INC.**

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Dated: January 30, 2006

## CERTIFICATE OF SERVICE

I, Erika E. Olsen, do hereby certify that on the 30th day of January, 2006, a copy of the foregoing Joint Opposition Of American Electric Power Service Corporation, Duke Energy Corporation, Wisconsin Electric Power Company, WPS Resources Corporation and Xcel Energy Inc. in the Matter of Fibertech Networks, LLC, Petition for Rulemaking, RM No. 11303, was submitted electronically to the Federal Communications Commission and served via Certified U.S. Mail, return receipt requested, upon the following:

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